STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ROBERT ALTMAN :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

In the Matter of the Petition :

of :

CHESTNUT OAKS ASSOCIATES :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

In the Matter of the Petition :

of :

STEVEN C. GREENE :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

In the Matter of the Petition :

of :

JONATHAN P. GREENE TRUST :

for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. :

DETERMINATION
DTA NOS. 814711, 814712, 814713, 814714 AND 814715

In the Matter of the Petition	:
of	:
KARIN B. GREENE TRUST	:
for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law.	:
	:

Petitioner Robert Altman, 20 Babbitt Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner Chestnut Oaks Associates, 20 Babbitt Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner Steven C. Greene, 20 Babbitt Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner Jonathan P. Greene Trust, 20 Babbitt Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner Karin B. Greene Trust, 20 Babbitt Road, Bedford Hills, New York 10507, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On June 4, 1996, petitioners Robert Altman, Chestnut Oaks Associates, Jonathan P. Greene Trust, and Karin B. Greene Trust by their representative, Steven C. Greene, Esq., and Steven C. Greene on his own behalf, and on June 12, 1996, the Division of Taxation, by Steven U. Teitelbaum, Esq. (Susan Hutchison, Esq., of counsel) executed respective consents to have

these matters determined on submission without a hearing. All documents and briefs were to be submitted by October 21, 1996, which date began the six-month period for the issuance of this determination. After due consideration of the entire record, Frank Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly aggregated the consideration received by a partnership that sold certain condominium units which it had purchased for investment at an auction of the Resolution Trust Company, the receiver of a failed savings bank.

FINDINGS OF FACT

1. Chestnut Oaks is a condominium project located on North Greeley Avenue in Chappaqua (Westchester County), New York. According to the first page from the Restated Condominium Offering Plan for Chestnut Oaks at Chappaqua, New York, the approximate date of the first offering to the public was July 15, 1982, and the approximate date of the restated offering was May 22, 1987 with the initial term of the restated offer to end on approximately May 21, 1988. This document identified the sponsor of the condominium as Chappastream Corporation and a total restated offering of 69 homes valued at $12,957,310.00.

2. It appears that the sponsor of the condominium project was unable to sell all of the units being offered pursuant to the restated offering plan. Twelve unsold condominium units were rented out to various individuals by Central Federal Savings Bank, which, according to a letter dated December 13, 1993 from attorney Steven C. Greene to a State tax technician, held the 12 units "as rentals until the bank became insolvent."

3. Chestnut Oaks Associates, a general partnership consisting of the four other named petitioners (Robert Altman, Steven Greene, Jonathan P. Greene Trust and Karin B. Greene Trust) as its partners, purchased the 12 condominium units at an auction of the Resolution Trust Company, as Receiver for Central Federal Savings Bank on June 12, 1992. The partnership, which had no relationship with the original condominium sponsor, purchased the 12 units as an investor. The record does not include a real estate sales contract between Chestnut Oaks

Associates and the Resolution Trust Company, as Receiver. Rather, the only sales contract included in the record is an unexecuted contract dated December 1991 between Chappastream Corp. and Chestnut Oaks Associates.

4. The 12 units purchased by Chestnut Oaks Associates had the following addresses: 305 North Greeley Avenue, 308 North Greeley Avenue, 311 North Greeley Avenue, 318 North Greeley Avenue, 319 North Greeley Avenue, 329 North Greeley Avenue, 335 North Greeley Avenue, 344 North Greeley Avenue, 346 North Greeley Avenue, 348 North Greeley Avenue, 351 North Greeley Avenue, and 369 North Greeley Avenue. The record reveals very little concerning these units and the relationship of their physical locations other than the stipulated fact that the "12 units were located in the same 88 unit condominium project originally sponsored by the Chappastream Corporation." Only the first page of the restated condominium offering plan was included in the record for review, and no affidavit of anyone with knowledge of the condominium project was provided. Consequently, the factual question concerning the basic nature of these units, for example, whether they were like garden apartments or separate single-family row houses, can only be answered with speculation.

5. It is observed that petitioners in their briefs recite certain factual allegations which, unfortunately, have not been established by the introduction of any evidence. For example, in their initial brief, petitioners, while conceding that units 318 and 319 are adjacent and contiguous units, contend that the "rest of the units are separated from one another by numerous units owned by other, unrelated individuals who purchased their properties many years earlier." They also assert that the "units are not all situated in one, single building, but rather in several buildings throughout the project" (emphasis added). This suggests that some of the units are situated in a single building, and it is unknown how many of the 12 units at issue are so situated. To add to the confusion, in their reply brief, petitioners assert that, "This condo project is over one mile in length and the subject condo's [sic] are scattered throughout" which is not entirely concordant with their assertions in the earlier brief.

6. Within months of its purchase of the 12 condominium units, the partnership resold the units to 12 different purchasers, who apparently were then occupying the respective units as tenants. The record does not disclose why the individuals who purchased their respective units from the partnership did not directly purchase their units at the auction. The partnership resold the units as follows:

Unit	Purchaser	Date of purchase	Purchase price
305 N. Greeley Ave.	Karen Shaw	9/15/92	$ 135,000.00
308 N. Greeley Ave.	Carol Leitner	9/15/92	156,000.00
311 N. Greeley Ave.	Kenneth & Ellen Schwebel	9/24/92	156,000.00
318 N. Greeley Ave.	Ali Javed & Ghazala Ali	7/01/92	164.000.00
319 N. Greeley Ave.	Thomas & Carol Zino	7/12/92	150,000.00
329 N. Greeley Ave.	Joseph Genovese	9/18/92	152,000.00
335 N. Greeley Ave.	Djordje & Marija Pejanovic	9/02/92	130,000.00
344 N. Greeley Ave.	Donald Pettinato	4/30/93	128,000.00
346 N. Greeley Ave.	Katie Gohde	11/02/92	125,000.00
348 N. Greeley Ave.	Andrew Bratt	10/30/92	128,000.00
351 N. Greeley Ave.	Howard Leitner	8/14/92	160,000.00
369 N. Greeley Ave.	Howard Magiliff & Suli Fassler	8/31/92	149,000.00
Total purchase prices			$1,733,000.00

7. The Division issued a Statement of Proposed Audit Adjustment dated October 25, 1994 against the partnership, Chestnut Oaks Associates, asserting real property gains tax due of $34,624.40 plus penalty and interest. An attached work sheet provided the following explanation for the tax asserted due:

> "Chestnut Oaks Associates acquired 12 condominium units as an investor from the R.T.C., as receiver for Central Federal Savings Bank in June of 1992. The resale of these units were aggregated pursuant to section 1440.7 of the Tax Law and Regulation 590.40 and the consideration was over 1 million dollars."

The Division computed a gain of $346,244.00 subject to the 10% gains tax, based upon the deduction of total original purchase price for the 12 units of $1,386,756.00 from total consideration received on the resale of the 12 units of $1,733,000.00. The partnership had not filed any pre-transfer gains tax questionnaires with the Division.

8. A Notice of Determination dated May 1, 1995 was issued by the Division against the partnership, Chestnut Oaks Associates, asserting tax due of $34,624.40 plus penalty and interest. This notice referenced the previously issued Statement of Proposed Audit Adjustment detailed in Finding of Fact "7". Corresponding notices of determination, each dated May 22, 1995, were issued by the Division against the four partners, Robert Altman, Steven C. Greene, Jonathan Greene Trust, and Karen Greene Trust, respectively.

9. The parties executed a stipulation of facts, dated June 28, 1996 by the Division's counsel and July 9, 1996 by attorney Steven C. Greene on petitioners' behalf. Relevant portions of this stipulation have been incorporated into these findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioners maintain that transfers pursuant to a condominium plan which may be properly aggregated under Tax Law § 1440(7) are limited to transfers made by the original sponsors or developers of condominium projects. Petitioners, as nonsponsors, who purchased condominium units for investment "should be treated the same as an investor who buys and sells single family homes in the same area" (Petitioners' brief, p. 5). In addition, petitioners contend that the transfers of the condominium units at issue may not be aggregated on the basis that they were contiguous or adjacent to one another because they were "separated by [other] privately owned condominiums" (Petitioners' brief, p. 11). Petitioners emphasize that there was no single offering plan to sell the 12 units which were transferred to 12 separate purchasers.

11. The Division counters that "the consideration Chestnut Oaks Associates received from the transfer of the 12 condominium units was properly aggregated pursuant to Tax Law section 1440(7) and then current regulation section 590.40(b), which states, 'All transfers of shares by a single investor are aggregated for purposes of applying the $1 million exemption'" (Division's brief, footnote 1 on p.3). The Division cites the decision of the Tax Appeals Tribunal in Matter of Marder (October 5, 1995) in support of its position that the transfers of condominium units by a single investor are properly aggregated. In the alternative, the Division contends that the consideration from the transfer of the 12 condominium units was properly

aggregated "because such units were located within the same project and were thus contiguous or adjacent" (Division's brief, p. 8).

12. Petitioners argue that the decision of the Tax Appeals Tribunal in Matter of Marder (supra) is "non-binding" and missed "the legislative intent of the aggregation provisions of the Gains Tax Law" (Petitioners' reply brief, pp. 2-3). Further, petitioners cite to Matter of Minzer (Tax Appeals Tribunal, May 20, 1993) wherein the Tribunal affirmed the administrative law judge who had determined that certain condominium units had not been transferred pursuant to a plan within the meaning of Tax Law § 1440(7) "because the instant transfers were not pursuant to the initial offering plan, but, instead, involved a subsequent sale by a purchaser under the plan." Further, petitioners maintain that the units were not contiguous or adjacent because they did not "have a common border or touch each other" (Petitioners' reply brief, p. 6).

CONCLUSIONS OF LAW

A. Tax Law former § 1441,[1] which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State.

B. Tax Law former § 1440(7)[2] defines a "transfer of real property" to mean:

> "the transfer or transfers of any interest in real property by any method, including but not limited to sale . . . or acquisition of a controlling interest in any entity with an interest in real property."

Pursuant to Tax Law former § 1443(1), such transfers are exempt from gains tax when the consideration is less than one million dollars.

C. Because a transferor could avoid gains tax by subdividing or selling off portions of the property for less than one million dollars each, Tax Law former § 1440(7) also includes an "aggregation clause" which permits the aggregation of the consideration received on multiple transfers (see, Matter of Executive Land Corp. v. Chu, 150 AD2d 7, 545 NYS2d 354, 356, appeal dismissed 75 NY2d 946, 555 NYS2d 692).

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[1]The real property transfer gains tax imposed by Article 31-B of the Tax Law was repealed on July 13, 1996. The repeal applies to transfers of real property that occur on or after June 15, 1996. (See, sections 171 through 180 of chapter 309 of the Laws of 1996.)

[2]The definition cited is the statutory definition effective for the period during which the transfers at issue transpired.

The aggregation clause of Tax Law former § 1440(7) provides as follows:

> "Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article . . . provided that the subdividing of real property
> and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property."

D. The regulations distinguish between transfers of contiguous parcels to one transferee (20 NYCRR 590.42) and transfers of contiguous parcels to more than one transferee (20 NYCRR 590.43) both of which may be subject to aggregation. In the matter at hand, Chestnut Oaks Associates transferred condominium units to more than one transferee so that 20 NYCRR 590.43 would be applicable. This regulation provides, in part, as follows:

> "Question: How is the aggregation clause of section 1440(7) of the Tax Law . . . applied in the case of:
>
> "(a) One transferor, more than one transferee, contiguous or adjacent parcels of land?
>
> "Answer: When the sales are pursuant to a plan or agreement, the consideration for each parcel is to be aggregated in determining whether the consideration is $1,000,000 or more.
>
> "A transferor may furnish, along with his questionnaire, a sworn statement that the sales are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise by included in the coverage of Article 31-B.
>
> "Whether the sales are pursuant to a plan or agreement depends on the intent of the transferor at the time of each transfer. The department will examine the transferor's intention, as manifested by his actions and the facts and circumstances surrounding the transfers, to ensure the transfers should not be aggregated."

E. The decision of the Tax Appeals Tribunal in Matter of Marder (supra) is determinative of the matter at hand, and petitioners' argument that it is "non-binding" is rejected. In Marder, the Tax Appeals Tribunal noted that "we affirm the determination of the Administrative Law Judge for the reasons stated in said determination." The administrative law judge had determined that the transfers of condominium shares by an investor were to be aggregated for

purposes of applying the $1,000,000.00 exemption from gains tax under Tax Law former § 1443(1) (Matter of Marder, Division of Tax Appeals, March 9, 1995). The Tax Appeals Tribunal in its decision affirming the administrative law judge summarized the administrative law judge's rationale for his conclusion as follows:

> "(1) that it was the intention of the Legislature 'that condominium plans and the sale of apartments pursuant to such plans be treated in the same manner as cooperative plans and the transfers of stock in such cooperative plans'; (2) since Tax Law § 1440(7) does not distinguish between transfers made by the original sponsor of the plan and subsequent sales of interests by purchasers/investors, transfers by such purchasers/investors are properly deemed a single transfer and should be aggregated; and (3) since 'the ownership interests in the condominium units could not even have been created, but for the existence of the original plan of the sponsor . . . all subsequent transfers of unit interests by one transferor should also be deemed as being pursuant to a condominium plan' [references by the Tribunal to specific conclusions of law of the administrative law judge have been omitted]."

This same rationale is properly applied to the purchase by the partnership, Chestnut Oaks Associates, of the 12 condominium units at the auction of the Resolution Trust Company. The partnership purchased these units as an investment, and its subsequent sale of the 12 units are properly deemed a single transfer and should be aggregated based upon the precedent of Matter of Marder (supra). It is of no consequence that the partnership was not the original sponsor of the condominium offering plan because the partnership's subsequent transfers of the 12 unit interests are properly deemed as being pursuant to a condominium plan within the meaning of Tax Law former § 1440(7) based upon the rationale itemized as "3" above in this conclusion of law.

F. Petitioners' reliance on Matter of Minzer, (Tax Appeals Tribunal May 20, 1993) is misplaced. In this earlier decision, the Tribunal affirmed the determination of the administrative law judge which found that the seven condominium units sold by an investor "were not sold pursuant to the initial offering plans" because the investor was not the sponsor of the condominium project (Matter of Minzer, Division of Tax Appeals, July 2, 1992). However, the Tribunal did not specifically approve this conclusion in contrast to its specific approval of the opposite position of the administrative law judge in Matter of Marder (supra). Accordingly, since the determination of an administrative law judge has no precedential value, the conclusion

reached by the administrative law judge in Minzer may be given no weight (see, Matter of Kornblum, Tax Appeals Tribunal, January 16, 1992, confirmed 194 AD2d 882, 599 NYS2d 158). In addition, a close reading of the facts in Matter of Minzer reveals that the investor in that matter had purchased condominium units in three different condominium projects subject to three respective offering plans unlike the matter at hand where the twelve units were all located in one condominium project subject to one offering plan. Consequently, Minzer may be distinguished on its facts as well.

G. In light of the inability of an administrative law judge to moot issues, the alternative basis for aggregating the transfers of the 12 units by Chestnut Oaks Associates will be addressed. Initially, it is observed that the Tax Appeals Tribunal in Matter of Minzer specifically noted with regard to the issue of whether certain condominium units were contiguous or adjacent properties that "our decision on these facts is not intended to, and does not, decide the case where the units are all in the same condominium." Therefore, the administrative law judge's conclusion in Matter of Minzer (supra), that condominium units located in three different condominiums were not adjacent or a single economic unit, may be given no weight in the matter at hand where the units are all part of the same condominium. Consequently, there has been no resolution by the Tax Appeals Tribunal of the issue whether condominium units may be considered adjacent for purposes of aggregating their transfers based upon their respective interests in common elements. This issue is crucial in determining whether a second basis exists for requiring the aggregation of the transfers at issue because 20 NYCRR 590.43, as detailed in Conclusion of Law "D", permits the aggregation of "contiguous or adjacent" properties which have been transferred by partial or successive transfers pursuant to a plan or agreement. Petitioners have argued that except for 2 units, the 12 units at issue were not "contiguous or adjacent."

H. In Matter of Calandra (Tax Appeals Tribunal, September 29, 1988), the Tribunal adopted the "ordinary, everyday" meaning of "adjacent" and concluded that while "contiguous" inferred "being in actual contact", "adjacent" included properties that were nearby, but not

touching. However, it is observed that the definition of "adjacent" in Webster's New Collegiate Dictionary (9th edition) includes the following analysis of the various synonyms for "adjacent":

> "Adjacent, adjoining, contiguous, juxtaposed mean being in close proximity. Adjacent may or may not imply contact but always implies absence of anything of the same kind in between; Adjoining definitely implies meeting and touching at some point or line; Contiguous implies having contact on all or most of one side; Juxtaposed means placed side by side esp. so as to permit comparison and contrast" (emphasis in original).

Based on this analysis of the various synonyms, it is concluded that condominium units may not be considered "adjacent" if they are separated by other condominium units.

Although the record on submission, as noted in Finding of Fact "4", reveals very little concerning the 12 condominium units and the relationship of their physical locations, based upon the numerical addresses for the units detailed in Finding of Fact "6", it would appear that at least some of the units are separated from each other by other units that were not part of the 12 at issue. However, it is mere speculation to conclude which of the 12 units are, in fact, separated by another unit given the inadequate evidentiary record. Since petitioners bear the burden of proof, they must suffer the consequences of this inability to determine which of the 12 units were not adjacent (see, Matter of Executive Land Corp. v. Chu, supra).

I. The petitions of Robert Altman, Chestnut Oaks Associates, Steven C. Greene, Jonathan P. Greene Trust, and Karin B. Greene Trust are denied, and the notices of determination dated May 1, 1995 against Chestnut Oaks Associates and dated May 22, 1995 against the other petitioners are sustained.

DATED: Troy, New York
February 13, 1997

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE